In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 285

ESTATE OF MAX STRAUSS, ALSO KNOWN AS MARX STRAUSS, DECEASED, MARJORIE F. TREGANOWAN, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 22-35) is reported in 13 T. C. 159. The opinion of the Court of Appeals (R. 54-64) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 6, 1950. (R. 64.) The petition for a writ of certiorari was filed September 1, 1950.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the amount of $20,000 paid to the widow of the decedent, a member of the New York Stock Exchange, at his death, out of the "Gratuity Fund" set up under the constitution of the Exchange, was received by her as insurance under a policy upon his life under Section 811(g)(2) of the Internal Revenue Code.

2. If so, whether the whole or only a part thereof is includible in the decedent's gross estate under that section and Section 404(c) of the Revenue Act of 1942.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, infra, pp. 10-13.

STATEMENT

The facts were stipulated (R. 36-46), and were found by the Tax Court as stipulated (R. 23-27). So far as material here, they may be summarized as follows:

The decedent was born in 1886 and died in 1944. In 1925 he was elected a member of the New York Stock Exchange and remained such until his death. (R. 23.)

By an amendment to its constitution the Exchange in 1873 adopted a plan providing for the

payment by its surviving members of a certain sum to the families of deceased members out of a fund then created and designated as the Gratuity Fund. (R. 23.) In this respect, the constitution contained the following further provisions:

Before anyone was admitted to membership in the Exchange, he was required to pay to the trustees of such fund the sum of $15. The trustees consisted of the chairman of the Board of Governors of the Exchange and six of its members. Each member was required to pledge himself to make a so-called voluntary gift to the family of each deceased member in the sum of $15, to be paid at quarterly periods on the dates on which dues to the Exchange were paid. The Exchange pledged its faith to pay, within one year after proof of the death of any member, out of the moneys so collected by it, the sum of $20,000, or so much thereof as may have been collected, to the widow and children of the deceased, or their issue, or his heirs under the laws of the State of New York, as the case might be; the liability of the Exchange being limited, however, to the payment of such sum, or to such part thereof as may be collected, after it shall have been collected from the members. Nothing contained in the constitution was to be construed as constituting any estate *in esse* which could be mortgaged or pledged by a member, and no member has at any time had the right to name, select, or designate any beneficiaries other than those named above or in any way to divest the benefits

Revenue Act of 1942

"§ 404. PROCEEDS OF LIFE INSURANCE

"(a) *General rule.* Section 811(g) (relating to life insurance) is amended to read as follows:

[See above]

* * * * *

"(c) *Decedents to which amendments applicable.* The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy."

Regulations 105:

"Sec. 81.25 (as amended by T. D. 5239, March 10, 1943) *Life Insurance.*—Section 811 (g) provides for the inclusion in the gross estate of insurance on the decedent's life (a) receivable by or for the benefit of the estate (for which see section 81.26), and (b) receivable by other beneficiaries (for which see section 81.27).

"The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system."

* * * * *

"Sec. 81.27 (as amended by T. D. 5239, March 10, 1943) *Insurance receivable by other beneficiaries.*—(*a*) *In case of decedent dying after October 21, 1942.*—The regulations prescribed under this paragraph (except as otherwise indicated herein or in paragraph (b) of this section) are applicable only in the case of decedents who died after October 21, 1942, the date of the enactment of the Revenue Act of 1942. In such cases, the amount of the aggregate proceeds of all insurance

on the life of the decedent not receivable by or for the benefit of his estate must also be included in his gross estate, as follows:

"(1) Such insurance (not includible under (2) of this paragraph) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, and

"(2) Such insurance with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any person.

"The purchase of insurance upon the life of the decedent is attributed to the decedent even though the premiums, or other consideration, are paid only indirectly by the decedent. As thus used, the phrase 'paid indirectly by the decedent' is intended to be broad in scope. For example, if the decedent transfers funds to his wife so that she may purchase insurance on his life, and she purchases such insurance, the payments are considered to have been made by the decedent even though they are not directly traceable to the precise funds transferred by the decedent. A decedent similarly pays the premiums or other consideration if payment is made by a corporation which is his alter ego or by a trust whose income is taxable to him, as, for example, a funded insurance trust. A payment is also made by the decedent if the decedent's employer makes the payment as compensation for services."

* * * * *

"For the purposes of (1) of this paragraph, in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy. For the purpose of the preceding sentence a reversionary interest is an incident of ownership. For a de-

from the persons specified in the constitution. (R. 23-25.)

Finally, the constitution provided that, if any contribution due to the Exchange, including the contribution to the Gratuity Fund, was not paid by any member within forty-five days after it became due, the delinquent member should be reported by the treasurer of the Exchange to the Chairman of the Board of Governors and that, after written notice mailed to him of such arrearages, such member might be suspended by the Board until payment was made. And, should payment not be made within one year after it was due, the membership of the delinquent might be disposed of by the Board on at least ten days' written notice mailed to him at his address registered with the Exchange. (R. 25.)

In the early period of the fund it was built up in four ways: (1) from an initial payment of $10 by each member of the Exchange and each person who was thereafter admitted to membership, (2) from allocation to the fund of half the annual profits of the Exchange in excess of $10,000, (3) from the excess of the amounts collected from surviving members over the amount paid to the kin of deceased members (which was originally $10,000), and (4) from the accumulation of interest on the invested capital of the fund. In 1896 the allocation to the fund of half of the annual profits in excess of $10,000 was terminated. In 1915 the accumulation of the income of the fund was termi-

nated and thereafter the net income was credited pro rata to the members of the Exchange in reduction of the amounts payable by them on the deaths of other members. (R. 26.)

On March 26, 1941, a constitutional amendment was adopted providing for the use of both capital and income of the fund as a credit against amounts otherwise payable by surviving members so long as the value of the fund should remain in excess of $500,000. During the period from January 15, 1925, to January 1, 1941, the trustees of the Gratuity Fund at the close of each fiscal or calendar year paid over to the treasurer of the Exchange the annual net income received as interest on the Gratuity Fund which in turn was credited pro rata to the members of the Exchange as of the first day of the succeeding fiscal or calendar year and applied in reduction of amounts payable by each member in respect of the deaths of other members. (R. 26.)

During the period from January 1, 1941, through July 19, 1945, the date on which the decedent's membership in the Exchange was transferred by the executrix, the trustees of the fund paid to the treasurer of the Exchange at the close of each quarterly period the aggregate of all amounts paid or payable by members of the Exchange under the provisions of the constitution in respect of deaths occurring during such quarter and the treasurer of the Exchange credited those amounts proportionately against the amounts so paid or payable

by each member in respect of the deaths of members occurring during that quarter. (R. 26-27.)

From January 15, 1925, through January 10, 1941, the gross amounts payable by decedent in respect of deaths of other members of the Exchange amounted to $3,185. During the same period the amounts credited to the decedent amounted to $1,024.52. (R. 27.)

From January 11, 1941, through September 11, 1944, when decedent died, the gross amounts payable by decedent in respect of deaths of other members of the Exchange amounted to $795. During the same period the amounts credited to decedent, as above stated, amounted to $795. From September 11, 1944, through July 19, 1945, the gross amounts payable by decedent's estate in respect of deaths of other members amounted to $255. During the same period the amounts credited to the decedent's estate in accordance with the above amounted to $255. (R. 27.)

Adele L. Strauss, the widow of decedent, received the sum of $10,000 by check dated October 16, 1944, issued by the "Trustees of the Gratuity Fund" of the Exchange, and also received the further sum of $10,000 by check dated July 9, 1945, issued by the "Trustees of the Gratuity Fund" of the Exchange. (R. 27.)

The Tax Court held that the $20,000 paid by the Exchange to the decedent's widow did not represent the proceeds of life insurance within the meaning of Section 811(g)(2) of the Internal Revenue

Code. Accordingly, it expunged the deficiency determined by the Commissioner against the decedent's estate as a result of his inclusion of the entire amount of the $20,000 therein. (R. 32.) The Court of Appeals reversed the Tax Court's decision and reinstated the deficiency. (R. 64.)

ARGUMENT

1. The Court of Appeals held that the $20,000 paid by the New York Stock Exchange to the widow of the decedent upon his death was the proceeds of a policy of life insurance upon his life within the meaning of Section 811(g)(2) of the Internal Revenue Code, Appendix, *infra*, p. 10 because, under the plan of the Exchange pursuant to which this amount became payable, the risk of loss from the decedent's premature death was shifted from him individually to the group of other members of the Exchange and was thus distributed among such group. We submit that in so holding the Court of Appeals correctly applied the principles laid down by this Court in *Helvering* v. *Le Gierse*, 312 U. S. 531, and *Keller* v. *Commissioner*, 312 U. S. 543, to the facts of this case. Since the case turns upon its own particular facts, and since there is no conflict with any other decision, we do not believe the question presented is of sufficient general importance to warrant review by this Court.

2. The Court of Appeals, with one dissent, further held that the decedent possessed at his

death such an incident of ownership in the policy as would bring it within the ambit of Section 811(g)(2)(B) of the Code (*infra*, p. 10), and that accordingly no part of the $20,000 should be excluded from decedent's gross estate under Section 404(c) of the Revenue Act of 1942 (Appendix, *infra*, pp. 10-11). We submit that this conclusion is likewise correct. The decedent retained the right and power to "surrender or cancel" the policy, since he retained the right and power to dispose of his membership in the Exchange and thereby not only to deprive the beneficiaries of their rights in the proceeds of the policy, but to confer such rights upon others. See Treasury Regulations 105, Sec. 81.27, as amended by T. D. 5239, 1943 Cum. Bull. 1081, 1082 (Appendix, *infra*, pp. 11-13). The definition of the term "incidents of ownership" as including the right of surrender or cancellation of a policy (first used in T. D. 5032, 1941-1 Cum. Bull. 427, 429, promulgated January 10, 1941, which amended Article 27 of Treasury Regulations 80 (1937 ed.)) has been expressly approved by Congress. H. Rep. No. 2333, 77th Cong., 2d Sess., p. 163 (1942-2 Cum. Bull. 372); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 234-236 (1942-2 Cum. Bull. 504).

The dissenting judge in the Court of Appeals did not question that in general the right to surrender and cancel a policy is an incident of ownership within Section 811(g)(2)(B). He rested his position, in effect, on the view that in the circum-

stances here presented that right was relatively so unimportant as not to come within the congressional purpose. In the absence of a conflict of decisions, we also do not believe the narrow question thus posed to be of sufficient importance to warrant review.

CONCLUSION

The decision of the court below rests on the particular facts of the case, is plainly correct, and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1950.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property. * * *

* * * * *

(g) [As amended by Sec. 404(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Proceeds of Life Insurance.*—

* * * * *

(2) *Receivable by other beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. * * *

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(26 U. S. C. 1946 ed., Sec. 811.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 404. PROCEEDS OF LIFE INSURANCE.

* * * * *

(c) *Decedents to which amendments applicable.*—The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy.

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.25 [As amended by T. D. 5239, 1943 Cum. Bull. 1081, 1092]. *Life Insurance.*—Section 811(g) provides for the inclusion in the gross estate of insurance on the decedent's life (*a*) receivable by or for the benefit of the estate (for which see Section 81.26), and (*b*) receivable by other beneficiaries (for which see Section 81.27).

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system. * * *

* * * * *

SEC. 81.27 [As amended by T. D. 5239, *supra*] INSURANCE RECEIVABLE BY OTHER BENEFICIARIES.—(*a*) *In case of decedent dying after October 21, 1942.*—The regulations prescribed under this subsection (except as otherwise indicated herein or in subsection (*b*) of

this section) are applicable only in the case of decedents who died after October 21, 1942, the date of the enactment of the Revenue Act of 1942. In such cases, the amount of the aggregate proceeds of all insurance on the life of the decedent not receivable by or for the benefit of his estate must also be included in his gross estate, as follows:

(1) Such insurance (not includible under (2) of this subsection) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, and

(2) Such insurance with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any person.

* * * * *

For the purposes of this section, the term "incidents of ownership" is not confined to ownership in the technical legal sense. For example, a power to change the beneficiary reserved to a corporation of which the decedent is sole stockholder is an incident of ownership in the decedent. For the purposes of this subsection, the term "incidents of ownership" includes the incidents of ownership described in subsection (*b*) (except as provided in the next sentence) and, in addition, includes incidents of ownership possessed by the decedent as manager of the community

where the insurance policy is properly held as community property by the decedent and spouse. Section 811(g)(2), as added by the Revenue Act of 1942, expressly provides that for the purposes of section 811(g)(2)(B) (see (2) of this subsection), but not for the purposes of section 811(g)(2)(A) (see (1) of this subsection), the term "incidents of ownership" does not include a reversionary interest. However, an assignment of an insurance policy by a decedent possessing other incidents of ownership therein under which he reserves a reversionary interest may result in the proceeds of the policy being includible in his gross estate under section 811(c). See section 81.25.

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